

FILED 10 NOV 05 09:40 USDC-ORP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KEVIN ROTH,

Plaintiff,

Civ. No. 09-3089-CL

v.

ORDER

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA; and AG
FORMULATORS, INC.,

Defendant.

PANNER, District Judge:

Magistrate Judge Mark D. Clarke filed a Report and Recommendation ("R and R") [#27], and the matter is now before this court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Defendant filed objections [#32] to the R & R. Plaintiff filed a response [#34] to defendant's objections. Accordingly, I have reviewed the file of this case *de novo*. See 28 U.S.C. § 636(b)(1)(c); McDonnell Douglas Corp. v. Commodore Bus. Mach.,

Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). I conclude the R & R is correct.

Defendant apparently argues that the R & R erred in rejecting the application of an unpublished Ninth Circuit opinion to the facts of this case. Defendant argues Helm v. Sun Life Assurance, Inc., 34 Fed. App'x 328, 331 2002 WL 726487 (9th Cir. 2002), which found identical language unambiguous, is "highly persuasive." Under 9th Circuit Rule 36-3(a) however, Helm has no precedential value. In fact, under Rule 36-3(c), defendant may not even cite Helm, as none of the exceptions for citing unpublished dispositions issued prior to January 1, 2007 apply. Some reasons behind Rule 36-3 are explained elsewhere. See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This!, Cal. Lawyer 43 (June 2000).

I conclude the R & R correctly determined that defendants have not overcome the presumption that a *de novo* standard of review applies. The ERISA statement here is not a plan document. Magistrate Judge Clarke's Report and Recommendation (#27) is adopted.

IT IS SO ORDERED.

DATED this 4 day of November, 2010.

A handwritten signature in black ink, appearing to read "Owen M. Panner", written over a horizontal line.

OWEN M. PANNER
U.S. DISTRICT JUDGE